

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

In re:

Case No.: 04-41383

Mark R. Mavis,

Chapter 13 Case

Debtor(s).

**TRUSTEE'S RESPONSE TO OBJECTION TO CONFIRMATION OF CHAPTER 13
PLAN AND MOTIONS TO DISMISS CASE FILED BY IRS**

TO: All parties in interest pursuant to Local Rule 9013-3.

1. Jasmine Z. Keller, Chapter 13 Trustee (the "Trustee"), files the following response to the objection to confirmation and motion to dismiss filed by the United States of America, Internal Revenue Service ("IRS") (the "Motion").

2. The court will hold a hearing on the Motion at 2:30 p.m. on September 2, 2004, in Courtroom No. 7 West, 7th Floor, United States Courthouse, 300 South 4th Street, Minneapolis, Minnesota.

3. This court has jurisdiction over the Motions pursuant to 28 U.S.C. §§ 157 and 1334, Bankruptcy Rule 5005 and Local Rule 1070-1. This proceeding is a core proceeding. The petition commencing this chapter 13 case was filed on March 16, 2004. The case is now pending in this court.

4. The Trustee joins in and supports the Motion of the IRS, and as additional support states as follows.

5. This is the fourth Chapter 13 case filed by this debtor in under four years.

6. Case no. 00-43447 was filed on August 1, 2000. The confirmed Chapter 13 plan in that case required the debtor to pay the Trustee \$722/mo. for 36 months, beginning in September 2000. The debtor made only a single payment of \$722 to the Trustee, on October 5, 2000, and the case was dismissed on April 11, 2001, on the Trustee's motion, for nonpayment.

7. Case no. 01-42361 was filed on May 25, 2001. The debtor's plan was modified several times in that case, in response to motions to dismiss brought by the Trustee due to the debtor's payment defaults. In all, the debtor was allowed *fourteen months of non-payment*, with the payment defaults to be brought current in future payments under the plan. The debtor made a total of only *four payments* to the Trustee, despite the fact that he remained in Chapter

13 until his case was finally dismissed on September 8, 2003, a total of over 27 months.¹

8. Case no. 03-46655 was filed on September 22, 2003. The first payment of \$1,600 was due by October 22, 2003. The Trustee filed objections to confirmation and a motion to dismiss and the case was dismissed on December 4, 2003. That day, the debtor brought in \$3,200, which was subsequently refunded to the debtor due to the dismissal of the case.

9. The debtor lists his employment as “President” of “West Metro Homes ‘R’ Us, Inc.” and says he has been so employed for “2 years.” No such corporation or employment was listed on his schedules in case no. 03-46655.

10. The debtor’s Plan is not feasible and confirmation should be denied pursuant to 11 U.S.C. § 1325(a)(6). The debtor has been unable to make payments of \$722/mo., \$1,488/mo.², or \$1,600/mo. in his prior Chapter 13 cases. His ability to belatedly come up with funds in response to pressure from the Trustee or others should not be confused with an ability to make all required payments and abide by the terms of a plan.

11. The Plan has not been filed in good faith.

12. Dismissal of the case for cause is appropriate under 11 U.S.C. § 1307(c), and a bar to future Chapter 13 filings is also appropriate as a sanction against this serial filer.

13. If testimony is required, Thomas E. Johnson or another employee of the Trustee, and the debtor, may be called to testify at the hearing on the objection.

14. The undersigned counsel for the Trustee was out of the office from June 19 through July 1. At the time I left, it was my understanding that the case had been dismissed and therefore I did not “flag” the file for follow up in my absence. The order vacating the dismissal was received while I was gone. Because of that situation and the subsequent holiday weekend, this response is not filed in accordance with the timetable set forth in this court’s order of June 4, 2004. Nevertheless, given the circumstances outlined herein, the Trustee asks that her response be considered timely.

WHEREFORE, the Trustee moves that the court grant the Motion and impose a bar to future Chapter 13 filings by this debtor, of appropriate duration and scope, and such other relief as may be just and equitable.

¹ It should be noted that the debtor’s case was dismissed on October 18, 2002, upon the Trustee’s affidavit of default based on the debtor’s failure to abide by a “cure order” to resolve his prior delinquent payments, but the dismissal was vacated on motion of the debtor and the case was reinstated by order of the court dated November 26, 2002.

² This was the amount of the debtor’s required payment in the most recent modified plan filed in case no. 01-42361.

Jasmine Z. Keller, Chapter 13 Trustee

Dated: July 6, 2004

/e/ Thomas E. Johnson

Thomas E. Johnson, ID # 52000
Margaret H. Culp, ID # 180609
Counsel for Chapter 13 Trustee
310 Plymouth Building
12 South 6th Street
Minneapolis, MN 55402
(612) 338-7591

VERIFICATION

I, Thomas E. Johnson, employed by the Chapter 13 Trustee, the movant named in the foregoing notice of hearing and motion, declare under penalty of perjury that the foregoing is true and correct according to the best of my knowledge, information and belief.

Executed on: July 6, 2004

/e/ Thomas E. Johnson

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MEMORANDUM OF FACTS AND LAW

FACTS

The Trustee relies upon the facts set forth in her verified motion, which, for the sake of brevity, will not be repeated here.

LEGAL DISCUSSION

The “feasibility” requirement for confirmation of a Chapter 13 plan is largely subsumed in 11 U.S.C. § 1325(a)(6), which requires a finding that “the debtor will be able to make all payments under the plan and to comply with the plan.”

Feasibility is a factual determination. . . . To satisfy feasibility, a debtor’s plan must have a reasonable likelihood of success, i.e., that it is likely that the debtor will have the necessary resources to make all payments as directed by the plan. . . . The debtor carries the initial burden of showing that the plan is feasible. . . . Before confirmation, the bankruptcy court should be satisfied that the debtor has the present *as well as the future financial capacity* to comply with the terms of the plan.

First Nat’l. Bank of Boston v. Fantasia (In re Fantasia), 211 B.R. 420, 423 (B.A.P. 1st Cir. 1997) (emphasis added), cited in 3 K. Lundin, *Chapter 13 Bankruptcy*, 3rd ed., § 198.1 at 198-1, 198-2 (2002).

This debtor has been in Chapter 13 for over three years, during which time he has made a grand total of *ten payments* to the Trustee, including three in the current case and a double payment on the date his last case was dismissed. His past payment defaults are well documented in the response and the Motions of file herein, and they belie his professed ability to make payments under the Plan. His Schedules I and J show, at best, disposable income of \$2,740, yet he now proposes to pay \$5,200 per month in payments, with no documentation or amendment of his schedules to show how he will be able to pay nearly twice what he originally proposed to pay. His Plan is clearly not feasible and confirmation should be denied.

The Trustee also contends that the debtor's Plan has not been filed in good faith. The determination of whether a Chapter 13 plan has been proposed in "good faith" is based on the totality of the circumstances. *In re Molitor*, 76 F.3d 218, 220-221 (8th Cir. 1996) (citing *In re LeMaire*, 898 F.2d 1346, 1349 (8th Cir. 1990)). Here, we have a debtor who has manipulated the system to remain in bankruptcy for over three years, all the while making no real effort to live up to his obligations under any of his many confirmed Chapter 13 plans. He has kept his creditors at bay while making only occasional payments to the Trustee, when threatened with dismissal of his case. He has made material omissions in his schedules by failing to list his employment in and ownership of a corporation that has purportedly paid him income for two years. He failed to schedule the IRS as a creditor on his prior cases, although he clearly knew or should have known that he owed back taxes for several years. The debtor has had more chances than he deserves. The Plan has not been filed in good faith and confirmation should be denied on this ground as well.

Dismissal is an appropriate remedy for cause, for all of the reasons stated above. Additionally, the court has the authority to issue a bar to future bankruptcy filings in an appropriate case. *See, In re Belden*, 144 B.R. 1010, 1022 (Bankr. D. Minn. 1992) (serial filer barred from filing another bankruptcy petition for a period in excess of two years). It does not appear as though this debtor has ever filed for relief under Chapters 7 or 11. Instead, his abusive and bad faith filings have been confined to the Chapter 13 arena. Therefore the Trustee is reluctant to endorse a total bar to any future bankruptcy filing, since the Trustee is of the opinion that a filing bar is in the nature of injunctive relief and should be tailored to address the behavior to be curbed.

CONCLUSION

The debtor's Plan is not feasible because the debtor has a proven track record of failing to live up to his commitments to make payments to the Trustee, clearly demonstrating a lack of disposable income to fund the payments required by the Plan. The Plan represents a bad faith manipulation of the Bankruptcy Code. Confirmation should be denied, the case should be dismissed, and the court should issue an appropriate bar to future bankruptcy filings.

Respectfully submitted:

Dated: July 6, 2004

/e/ Thomas E. Johnson

Thomas E. Johnson, ID # 52000
Margaret H. Culp, ID # 180609
Counsel for Chapter 13 Trustee
310 Plymouth Building
12 South 6th Street
Minneapolis, MN 55402
(612) 338-7591

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UNSWORN DECLARATION FOR PROOF OF SERVICE

I, Thomas E. Johnson, employed by Jasmine Z. Keller, Chapter 13 Trustee, declare that on July 6, 2004, I served Response to Objections to Confirmation of Chapter 13 Plan and Motions to Dismiss Case, etc., and Memorandum of Facts and Law on the individual(s) listed below, in the manner described:

By e-mail:

United States Trustee
1015 United States Courthouse
300 South 4th Street
Minneapolis, MN 55415

By first class U.S. mail, postage prepaid:

Mark R. Mavis
19085 Homestead Circle
Eden Prairie, MN 55346

Dana Dullum, Esq.
Kingsbury & Associates, Ltd.
14827 Energy Way
Apple Valley, MN 55124

Roylene A. Champeaux, AUSA
600 U.S. Courthouse
300 South 4th Street
Minneapolis, MN 55415

Paul A. Weingarden, Esq.
Usset & Weingarden, PLLP
4300 Park Glen Road, Suite 310
Minneapolis, MN 55418

Real Financial Center
c/o Stewart, Zlimen & Jungers, Ltd.
430 Oak Grove St., Suite 200
Minneapolis, MN 55403

Wells Fargo Home Mortgage, Inc.
c/o McCalla, Raymer, et al.
Bankruptcy Department
1544 Old Alabama Road
Roswell, GA 30076

And I declare, under penalty of perjury, that the foregoing is true and correct.

Executed: July 6, 2004

/e/ Thomas E. Johnson